

NO. 50451-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RACHELLE C. CABE,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

The trial court erred when it ruled that it did not have discretion under RCW 9.94A.589 to run the defendant's sentence concurrent with an existing sentence imposed for a subsequent offense.

Issues Pertaining to Assignment of Error

Under RCW 9.94A.589 does a trial court have discretion to run a felony sentence concurrently with an existing sentence imposed for a subsequent offense?

STATEMENT OF THE CASE

By information filed December 9, 2015, the Clallam county Prosecutor charged the defendant Rachelle C. Cabe with one count of second degree burglary, arising out of her conduct of shoplifting from a store that had previously given her a trespass notice. CP 97-97. The date of the offense was September 21, 2015. *Id.* In May of 2015 the defendant entered a drug court contract with the state whereby she agreed to refrain from any further criminal conduct and to successfully complete drug treatment in return for the state's agreement to dismiss the charges upon her successful completion of the drug court program. CP 78-82. On May 13, 2016, the Clallam County Superior Court held a hearing on the defendant's request for entry into the drug court program and ultimately granted her request. RP 1-11¹; CP 82. The trial court subsequently entered an order releasing the defendant from custody. RP 73. In less than one month, the Clallam County Superior Court entered a warrant for the defendant's arrest on the allegation that she was already out of compliance with her drug court program. CP 71-72.

On October 8, 2016, about five months after her entry into the

¹The record on appeal includes on volume of consecutively numbered verbatim reports of the hearings held in this case on 5/13/16, 3/3/17, 3/10/17 and 3/23/17. It is referred to herein as "RP [page #]."

Clallam County Drug Court program, the defendant committed a burglary and theft in Kitsap County and was charged with both of those offenses. CP 99-110. On January 26, 2017, she pled guilty to those offenses, received a sentence of 51 months in prison on the burglary charge, and was sent to prison. *Id.* During this time the Clallam County warrant for the defendant was still outstanding. CP 71.

Once the defendant arrived in prison she filed a “Request for Speedy Trial” so she could resolve the outstanding Clallam County warrant in the case at bar prior to the completion of the Kitsap County sentence. CP 65-66; RP 1-11, 11-19. The Clallam County Superior Court later signed an order transferring the defendant back to the Clallam County Jail to face the state’s petition to remove her from drug court based upon her violation of the drug court contract through the commission of a subsequent offense. CP 67-72.

Once back in Clallam County the defendant stipulated to her removal from the drug court program. RP 21. The court then signed an order removing her from the drug court program, found her guilty pursuant to a stipulated trial, and then proceeded to sentencing, with all parties agreeing that the correct range was from 51 to 68 months on an offender score of 9+ points. CP 60; RP 29-43; CP 41-56. The prosecutor then made

the following argument as to the sentence that should be imposed:

Ms. Cabe's in Drug Court and then picks up another offense out at Kitsap. She has one, two, three, four, four burglary convictions and one possession of a controlled substance. That makes her offender score nine. Seriousness level, three. Standard range of 51 to 68 months. The State is asking that she be imposed 51 months on Count I and that it be served consecutively to the Kitsap County case 15-1-01176-4. There's no community custody.

RP 33.

The defense then made the following comments concerning the sentence the court should impose:

I agree that 51 months is the low end of the standard range. I'd ask the Court to impose such a sentence. I believe my client is already serving a lengthy sentence out of Kitsap County as well. If that's imposed consecutively that will be longer.

Given the length of time Ms. Cabe is facing, quite frankly I think that the legal financial obligations ought to be limited to the \$800 and so-called mandatory legal financial obligations as well as the restitution. That will be plenty of responsibility for her after she serves the time she's got to serve.

RP 34.

At this point the court entered into a colloquy with the defendant, during which the defendant asked that the court run her current sentence concurrent with her Kitsap County sentence. ("I would just ask that the Court would run it concurrent with the 51 months I'm already doing in Kitsap County.") RP 37. Specifically, the defendant explained that she was

pregnant, and that (1) if the sentences were run concurrently she would qualify for the “parenting program” in prison whereby she would be able to keep her baby with her, and (2) that if the sentences were run consecutively she would not qualify for that program. RP 37.

Towards the end of the colloquy the court asked the prosecutor about the defendant’s request that her sentences run concurrently. (“I’m going to ask Ms. Devlin if she wishes to comment on the request to run them, at the same time as I like to say.”) RP 40. The prosecutor responded to this question by reviewing the defendant’s criminal history in detail and then arguing that under the law the court had to run the two sentences consecutively. RP 41. The prosecutor’s words on this argument were as follows:

The State’s reading of her criminal history, she was under sentence at the time she was convicted and therefore it shall be consecutive and I’m sorry, I’m not heartless, I understand that Ms. Cabe has a child but that is something that should have been considered all the time during these criminal sprees. There’s a potential for a child at any time and unfortunately that’s where we are and this is a situation that the State nor Mr. Oakley or the Court made but Ms. Cabe made. So I’m asking the Court to run that consecutively.

RP 41 (emphasis added).

At this point the defendant protested that the prosecutor had implied that she had been using drugs while pregnant, which the defendant

claimed was untrue. RP 41-42. The court then apparently agreed with the prosecutor's analysis that under the law the court had to run the sentences consecutively, regardless of its desire to do otherwise. RP 42². The court's ruling on this issue was as follows:

THE COURT: All right, all right. That's how I interpreted your comments and I think that it's, it kind of comes out at the same place though to be honest. *I'd like to tell you that I had better news but I don't really so I think the way I read the law we're kind of - I don't have a whole lot of options here and I'm going to run them one after the other or consecutive 51 months*, I'll waive the attorney fee. I don't feel good about it but it's one of these things when things play out this way that's what occurs so I need to tell you that you may not own, use or possess firearms unless your right to do so is restored by a court of record. I think you might have heard that before.

RP 42 (emphasis added).

At no point did the defendant's attorney argue that the court had discretion to run the sentences concurrently. CP 30-43.

Following imposition of sentence the defendant filed timely notice of appeal. CP 14-32. The following sets out a time line from the foregoing events.

²Under RAP 10.3(a)((5) the Statement of the Case is supposed to include a "fair" rendition of the "facts and procedure relevant to the issues presented for review, without argument." Appellant believes this sentence meets this requirement. However, given the possibility that the state or the court might disagree, Appellant has included the trial court's ruling verbatim from which the parties can present their arguments.

1. 9/21/15: defendant commits a burglary in Clallam County;
2. 12/9/15: defendant charged with the Clallam County burglary
3. 5/13/16: defendant enters drug court on the Clallam burglary
4. 5/25/16: defendant released from custody
5. 6/9/16: Clallam court orders warrant of arrest for defendant
6. 10/8/16: defendant commits burglary/theft in Kitsap County
7. 1/26/17: Defendant pleads to burglary/theft in Kitsap County, is sentenced to 51 months and then is remanded to custody of DOC
8. 2/22/17: From prison, Defendant files "Request for Speedy Trial" in Clallam Superior Court
9. 3/10/17: Defendant transferred from DOC to Clallam County jail, appears in court, and then stipulates to removal from Drug Court
10. 3/23/17: Court finds defendant guilty at stipulated facts trial on Clallam County burglary, court then sentences defendant to 51 months consecutive to Kitsap County sentence of 51 months for a total of 102 months

Both the Judgment and Sentence and the Warrant of Commitment in this case state that the defendant's 51 months sentence is to run consecutive to the sentence in *State v. Cabe*, Kitsap County No. 15-1-01176-4. CP 45. The prosecutor also used this number during the sentencing hearing, stating as follows: "The State is asking that she be imposed 51

months on Count I and that it be served consecutively to the Kitsap County case 15-1-01176-4.” RP 33.

In fact, the use of the number 15-1-01176-4 in all three instances is an error. *See* CP 99-109, 110-120. The sentence in Kitsap County case 15-1-01176-4 was for 7 months on a charge of possession of heroin, imposed on December 8, 2015. CP 110-120. This predated the sentence in the case at bar by 15 months. *Id.* The only case with which the court could order the current case to be consecutive or concurrent was the Kitsap County Case in the subsequent burglary/theft, No. 16-1-01305-6. CP 99-109.

ARGUMENT

THE TRIAL COURT ERRED WHEN IT RULED THAT IT DID NOT HAVE DISCRETION TO RUN THE DEFENDANT'S SENTENCE CONCURRENT WITH AN EXISTING SENTENCE IMPOSED FOR A SUBSEQUENT OFFENSE.

Under RCW 9.94A.589(3), a trial court has discretion to run a sentence on a felony concurrently with an existing sentence imposed on a subsequent offense. *State v. Smith*, 74 Wn.App. 844, 851, 875 P.2d 1249 (1994), *review denied*, 125 Wn.2d 1017 (1995). This statute states:

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

RCW 9.94A.589(3).

An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001). In addition, an abuse of discretion also occurs then the trial court refuses to exercise its discretion at all. *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005) (refusal to apply court's discretion to consider a DOSA for a person otherwise qualified constitutes an abuse of discretion).

In the case at bar the trial court held a stipulated facts trial on March 23, 2017, and found the defendant guilty of a burglary she had committed on September 21, 2015. At the time the court found the defendant guilty in the case at bar, she was serving a 51 months sentence the Kitsap County Superior Court had imposed on January 26, 2017, for the Kitsap County burglary she had committed on October 8, 2016. Thus, under RCW 9.94A.589(3), in the case at bar the Clallam County Superior Court was sentencing the defendant for “a felony that was committed while the [defendant] was not under sentence for conviction of a felony.” Consequently, the Clallam County Superior Court had discretion to run that sentence concurrently or consecutively “with any felony sentence which ha[d] been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced.” Since the Kitsap County sentence was imposed for the defendant’s commission of “a crime subsequent to the commission of the crime being sentenced,” RCW 9.94A.589(3) applied and the trial court had discretion to run the sentences concurrently or consecutively.

Although the trial court in the case at bar did have discretion to run the current sentences concurrently, a review of the sentencing hearing indicates that the defense attorney, the prosecutor and the court did not

understand this fact. As was set out in the Statement of Facts, the defendant's attorney did not argue that the court had discretion to run the sentences concurrently or that it should do so. When the defendant asked that the sentences run concurrently the prosecutor argued that the court did not have this authority. The prosecutor's exact words were as follows:

The State's reading of her criminal history, she was under sentence at the time she was convicted and therefore it shall be consecutive and I'm sorry, I'm not heartless, I understand that Ms. Cabe has a child but that is something that should have been considered all the time during these criminal sprees. There's a potential for a child at any time and unfortunately that's where we are and this is a situation that the State nor Mr. Oakley or the Court made but Ms. Cabe made. So I'm asking the Court to run that consecutively.

RP 41 (emphasis added).

The substance of the court's response was that the prosecutor was correct and that the court had to run the sentences consecutively regardless of its desire to do otherwise. The court's specific ruling on this issue was as follows:

THE COURT: All right, all right. That's how I interpreted your comments and I think that it's, it kind of comes out at the same place though to be honest. ***I'd like to tell you that I had better news but I don't really so I think the way I read the law we're kind of - I don't have a whole lot of options here and I'm going to run them one after the other or consecutive 51 months***, I'll waive the attorney fee. I don't feel good about it but it's one of these things when things play out this way that's what occurs so I need to tell you that you may not own, use or possess firearms unless your right

to do so is restored by a court of record. I think you might have heard that before.

RP 42 (emphasis added).

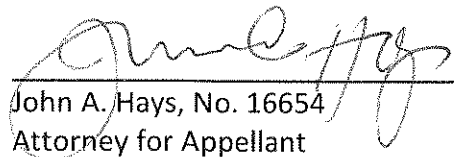
As the court noted in *State v. Grayson, supra*, a trial court's failure to exercise discretion when the law requires it also constitutes an abuse of discretion, just as much as does an exercise of discretion that is manifestly unreasonable or that is based upon untenable grounds or reasons. Thus, in the case at bar, the trial court abused its discretion when it failed to recognize that it had the authority to impose concurrent sentences in the case at bar. As a result, this court should vacate the defendant's sentence and remand her case for a new sentencing hearing during which the trial court recognizes and properly exercises its discretion to run the sentences concurrently or consecutively.

CONCLUSION

The trial court erred when it ruled that it did not have discretion to order that the sentence in this case run concurrently with another sentenced imposed for an offense that the defendant committed after the offense in the case at bar. As a result, this court should vacate the defendant's sentence and remand with instructions to hold a new sentencing hearing during which the trial court recognizes and properly exercises its discretion to run the sentences concurrently or consecutively.

DATED this 15th day of August, 2017.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

RCW 9.94A.589

Consecutive or Concurrent Sentences

(1)(a) Except as provided in (b), (c), or (d) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under this subsection (1)(b) shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

(c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other

current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

(d) All sentences imposed under RCW 46.61.502(6), 46.61.504(6), or 46.61.5055(4) shall be served consecutively to any sentences imposed under RCW 46.20.740 and 46.20.750.

(2)(a) Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

(b) Whenever a second or later felony conviction results in community supervision with conditions not currently in effect, under the prior sentence or sentences of community supervision the court may require that the conditions of community supervision contained in the second or later sentence begin during the immediate term of community supervision and continue throughout the duration of the consecutive term of community supervision.

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

(4) Whenever any person granted probation under RCW 9.95.210 or 9.92.060, or both, has the probationary sentence revoked and a prison sentence imposed, that sentence shall run consecutively to any sentence imposed pursuant to this chapter, unless the court pronouncing the subsequent sentence expressly orders that they be served concurrently.

(5) In the case of consecutive sentences, all periods of total confinement shall be served before any partial confinement, community restitution, community supervision, or any other requirement or conditions

of any of the sentences. Except for exceptional sentences as authorized under RCW 9.94A.535, if two or more sentences that run consecutively include periods of community supervision, the aggregate of the community supervision period shall not exceed twenty-four months.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

vs.

RACHELLE C. CABE,
Appellant.


NO. 50451-1-II

**AFFIRMATION
OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Diane C. Hays

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